Oct 23. 78. Arg'd & Aff'd error. N. H. Swayne

8 Otto 1 1
Oct. 7. 1878

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. 284. 38.

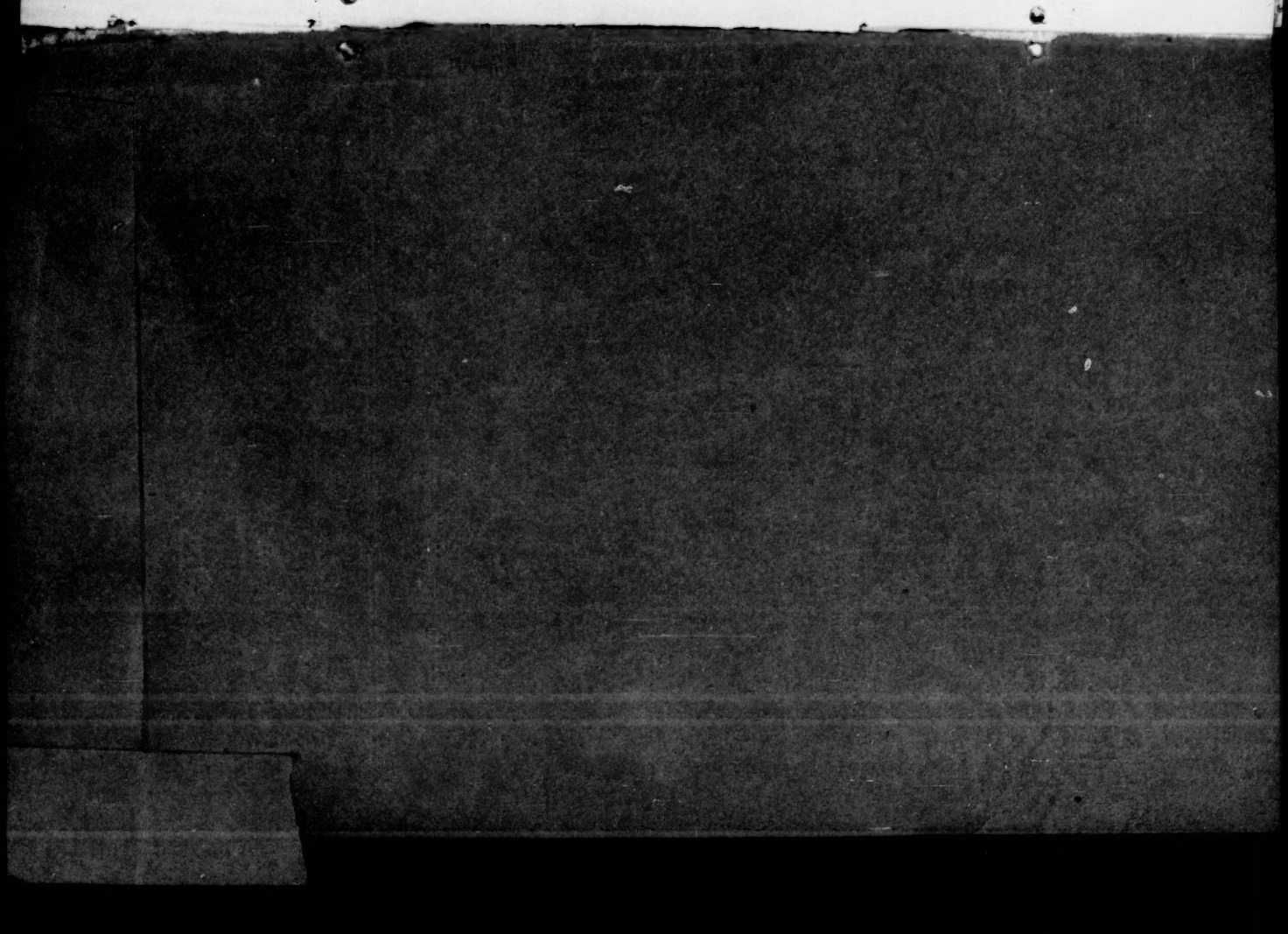
DANIEL PALMER, PLAINTIFF IN ERROR,

vs.

JOSEPH W. LOW, CHARLES L. KELLOGG, S. O. HOUGHTON, GEORGE B. BRADFORD, CYRUS PALMER, C. W. KINSMAN, W. L. PALMER, J. W. KNOX, CHARLES CLAYTON, AND S. H. HARMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 26, 1875.



SUPREME COURT OF THE UNITED STATES.

No. 291.

DANIEL PALMER, PLAINTIFF IN ERROR,

vs.

JOSEPH W. LOW, CHARLES L. KELLOGG, S. O. HOUGHTON, GEORGE B. BRADFORD, CYRUS PALMER, C. W. KINSMAN, W. L. PALMER, J. W. KNOX, CHARLES CLAYTON, AND S. H. HARMON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Writ of error	a	1
Citation and service	b	1
Summons	1	2
Complaint	4	3
Answer	7	4
Findings	10	5
Judgment	32	11
Bill of exceptions	35	12
Bond	42	14
Clerk's certificate	45	16

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the north judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Daniel Palmer, plaintiff in error, and Joseph W. Low, Charles L. Kellogg, S. O. Houghton, George B. Bradford, Cyrus Palmer, C. W. Kinsman, W. L. Palmer, I. W. Knox, Charles Clayton, and S. H. Harmon, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second Monday of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth.

[SEAL.] Attest, &c. L. S. B. SAWYER,
Clerk.
By J. F. O'BEIRNE,
Dep. Cl'k.

The answer of the judges of the circuit court of the United States for the district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court.

L. S. B. SAWYER,
Clerk,
By J. F. O'BEIRNE,
Dep. Cl'k.

(Indorsed:) 1044. United States Supreme Court. Daniel Palmer vs. Jos. W. Low et al. Writ of error. Filed 21st Oct'r, 1874. L. S. B. Sawyer, cl'k, by J. F. O'Beirne, dep. cl'k.

b UNITED STATES OF AMERICA, *ss:*

To Joseph W. Low, Charles L. Kellogg, S. O. Houghton, George B. Bradford, Cyrus Palmer, C. W. Kinsman, W. L. Palmer, I. W. Knox, Charles Clayton, and S. H. Harmon, defendants in error, greeting:

You are hereby cited and admonished to be and appear at a Supreme

Court of the United States of America, to be held at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, wherein Daniel Palmer is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 21st day of October, A. D. 1874, and of the Independence of the United States the ninety-ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

Service of the within citation this 27th day of October, 1874, is hereby admitted.

HOUGHTON & REYNOLDS,
Attorneys for Defendants.

(Indorsed:) 1044. United States Supreme Court. Daniel Palmer vs. Jos. W. Low et al. Citation. Filed October 30, A. D. 1874. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. cl'k.

1 UNITED STATES OF AMERICA.

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

DANIEL PALMER, PLAINTIFF,
vs.
JOSEPH W. LOW ET AL., DEFENDANTS.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

Summons.

The President of the United States of America to Joseph W. Low, Charles L. Kellogg, S. O. Houghton, John Doe, Richard Roe, James White, John Blue, and John Red, defendants, greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a copy of
2 which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or if served out of this county, then within forty days, or judgment by default will be taken against you.

The said action is brought to obtain a judgment against you for the possession of certain lands and premises situated in said district, and particularly described in said complaint, together with damages alleged to have been sustained by the plaintiff for the unlawful withholding thereof, and for the loss of the value of the rents and profits thereof, together with costs of suit, and if you fail to appear and plead, answer or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, this 30th day of April,
3 in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-sixth.

[SEAL.] LORENZO S. B. SAWYER,
Clerk.
By J. F. O'BEIRNE, *Deputy Clerk.*

(Endorsed:)

OFFICE OF U. S. MARSHAL.

I hereby certify that I served the within summons personally by delivering certified copies of the same, together with copies of the complaint, to C. L. Kellogg on the 1st, and to J. W. Low on the 2d day of May, A. D. 1872, both in the city and county of San Francisco.

W'M GOUVERNEUR MORRIS,
U. S. Marshal,
By B. J. AKERMAN, *Deputy.*

(Endorsed:) Barstow, Stetson and Houghton, plaintiff's attorneys. Filed 2nd May, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

4 In the circuit court of the United States in and for the district of California.

DANIEL PALMER
vs.
JOSEPH W. LOW, CHARLES L. KELLOGG, S. O. Houghton, John Doe, Rich'd Roe, James White, John Blue, and John Red.

Complaint.

The above-named plaintiff complains of the above-named defendants (the real names of the last five named defendants being unknown to plaintiff, for which reason he has sued them by fictitious names; and he prays that their true names, when discovered, may be inserted herein, and they be made parties hereto), and for cause of action alleges as follows:

That the plaintiff is, and at the several times hereinafter mentioned was, a citizen of the State of Massachusetts, and that the said several defendants are, and were at the said times, citizens of the State of California.

5 That on the 29 day of April, 1872, the above-named plaintiff was, since has been, and now is, the owner in fee-simple, and entitled to the possession of that certain piece or parcel of land, situate in the city and county of San Francisco, State of California, bounded and described as follows, to wit:

Commencing at a point on the northeast line of Second street distant two hundred and seventy-five feet, southeasterly from the east corner of Folsom and Second streets; thence running northeasterly, at right angles to Second street, one hundred and thirty-seven and one-half feet; thence at right angles northwesterly, one hundred and thirty-seven and one-half feet; thence at right angles southwesterly, sixty-seven and one-half feet; thence at right angles southeasterly, one hundred feet; thence at right angles southwesterly, seventy feet, to the northeast line of Second street; thence southeasterly along said northeast line of Sec-

ond street, thirty-seven and one-half feet, to the place of beginning, being a portion of 100 vara, lot No. 39, as laid down upon the official map of the city and county of San Francisco.

6 That said defendants at said date were, since have been, and still are, in the adverse, wrongful, and unlawful possession of said premises, without any right or title whatever.

That said defendants during all of said time have wrongfully withheld, and still do wrongfully withhold, the possession of said premises and of the whole thereof from said plaintiff, to his great damage in the sum of five thousand dollars.

That the value of the rents and profits of said premises during all of said time has been, and yet is, two hundred dollars per month.

Wherefore plaintiff demands judgment herein against the defendants for the possession of said premises, for five thousand dollars damages, as aforesaid, for the value of the rents and profits of said premises, at the rate of two hundred dollars per month, and for costs of suit.

BARSTOW, STETSON & HOUGHTON,
Att'ys for Pl'ff.

(Endorsed:) Filed 30th April, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

7 In the circuit court of the United States in and for the district of California.

DANIEL PALMER, PLAINTIFF,
vs.
JOSEPH W. LOW ET ALS., DEFENDANTS.

Answer.

Now come the defendants, by Houghton and Reynolds, their attorneys, and, answering the complaint of the plaintiff in this action, deny each and every allegation in said complaint contained as fully and specifically as though each and every allegation therein contained was here set forth at length and specifically denied, and say they are not guilty of the trespass and ejectment therein alleged against them.

And for another and separate answer and defense, the said defendants say that neither the said plaintiff nor his ancestor, predecessor, or grantor, was seized or possessed of the premises described in the complaint herein or in question in this action, or any part thereof,

8 within five years before the commencement of such action.

And as another and separate defense, the defendants say that this action was commenced more than one year after the passage of an act of the legislature of the State of California entitled "An act to limit the time for the commencement of civil actions in certain cases," which act was approved on the 5th day of March, 1864.

And the defendants further say that the plaintiff, his ancestor, predecessor, or grantor, did not have the actual possession of the land in dispute in this action, or any part thereof, within five years next before the commencement of this action.

Wherefore the defendants aver that said action is barred by the provisions of said act of the legislature of the State of California, and by reason of the provisions of said act the plaintiff cannot maintain this action.

Wherefore the defendants pray that they may go hence without day, with the costs of this action.

HOUGHTON & REYNOLDS,
Att'ys for Def'ts.

9 (Endorsed:) Service admitted on this 5th June, 1872. Barstow, Stetson & Houghton, attorneys for plaintiff. Filed 5 June, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

10 In the circuit court of the United States for the district of California.

DANIEL PALMER
v.
JOSEPH W. LOW ET AL.

The parties to this action having waived a jury, the same was tried before the court, which now makes and files its findings of fact and conclusions of law, as follows:

Findings of fact.

First. That the grantors of the plaintiff entered into the possession of the demanded premises without title, about the year 1851 or 1852, and they and the plaintiff continued in the exclusive and adverse possession thereof down to the 8th day of May, 1867, when the grantor of defendant S. O. Houghton was placed in the possession thereof by the sheriff of the city and county of San Francisco, under legal
11 process issued in the case of Donner vs. Palmer et al., to which suit neither the plaintiff nor any of his grantors deriving title from any party to said suit, subsequently to the commencement thereof, was a party.

Second. That the lot of which the premises in controversy are a part, is within the limits of the pueblo of San Francisco, now the city of San Francisco; that George Hyde was, on the 19th day of July, 1847, the duly qualified and acting alcalde of said pueblo, and, as such alcalde, said Hyde, on said day last mentioned, granted said lot to George Donner, by a grant thereof duly made, recorded, and delivered by said alcalde, and the material portion of said grant was registered and recorded in a proper book of record, deposited in the office and in the custody and control of the recorder of the county of San Francisco, before the third day of April, A. D. 1850, and which book and record remained in said office, and in the custody and control of the said recorder, till and on said third day of April, 1850, and has so continued to
12 remain from said date to the present time.

Third. That defendant S. O. Houghton has, through mesne conveyances, acquired all the right, title, and interest of said Donner in and to said lot, and that the defendants, other than said Houghton, were at the time this action was commenced in the occupation of the part thereof which is in controversy in this action, as the tenants and lessees of said Houghton.

Fourth. That said premises are within the city of San Francisco, and lie east of Larkin street, and northeast of Johnston street; and that the claim of San Francisco to the municipal lands within its boundaries had not been finally confirmed by the government of the United States, or its legally constituted authorities, at the date of the passage of the amendment to the statute of limitations of California, April 18th, 1863, or of the act of Congress entitled "An act to expedite the settlement
13 of titles to lands in the State of California," approved July 1, 1864, confirming the ordinance known as the Van Ness ordinance.

Fifth. That the common council of the city of San Francisco passed

an ordinance, number eight hundred and twenty-two, entitled "Ordinance for the settlement and quieting of the land-titles in the city of San Francisco," approved by the mayor of said city on the twentieth day of June, A. D. 1855, which ordinance is commonly known and designated as "the Van Ness ordinance." The said ordinance is recited in full in the act of the legislature of the State of California approved March 11th, 1858, hereinafter in the sixth finding set out, to which act and finding, for the terms and provisions of said ordinance, reference is hereby made.

Sixth. That the legislature of the State of California passed an act confirming the said ordinance known as the "the Van Ness ordinance," mentioned in the fifth finding, which act is entitled "An act con-
14 cerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," and was approved March 11th, 1858, and is in the words and figures following, viz:

An act concerning the city of San Francisco and to ratify and confirm certain ordinances of the common council of said city. (Approved March 11, 1858.)

The people of the State of California, represented in senate and assembly, do enact as follows:

SECTION 1. Whereas the common council of the city of San Francisco passed an ordinance, approved by the mayor on the twentieth day of June, A. D. one thousand eight hundred and fifty-five, which ordinance is in the words and figures following, to wit:

Number eight hundred and twenty-two. Ordinance for the settlement and quieting of the land-titles in the city of San Francisco.

15 The people of the city of San Francisco do ordain as follows:

§ 1. It shall be the duty of the mayor to enter at the proper land office of the United States, at the minimum price, all the lands above the natural high-water mark of the bay of San Francisco, at the time of the admission of California into the Union as a State, situated within the corporate limits of the city of San Francisco, as defined in the act to incorporate said city, passed April fifteenth, one thousand eight hundred and fifty-one, in trust for the several use, benefit, and behoof of the occupants or possessors thereof, according to their respective interests.

§ 2. The city of San Francisco hereby relinquishes and grants all the right and claim of the city to the lands within the corporate limits, to the parties in actual possession thereof, by themselves or tenants, on or before the first day of January, A. D. one thousand eight hundred and fifty-five, and to their heirs and assigns forever, excepting the property known as the slip property, and bounded on the north by Clay
16 street, on the west by Davis street, on the south by Sacramento street, and on the east by the water-line front; and excepting also, any piece or parcel of land situated south, east, or north of the water-lot front of the city of San Francisco, as established by an act of the legislature of March twenty-sixth, A. D. one thousand eight hundred and fifty-one: Provided such possession has been continued up to the time of the introduction of this ordinance in the common council; or, if interrupted by an intruder or trespasser, has been or may be recovered by legal process; and it is hereby declared to be the true intent and meaning of this ordinance that when any of the said lands have been occupied and possessed under and by virtue of a lease or demise, they shall be deemed to have been in the possession of the landlord or lessor under whom they were

so occupied or possessed: Provided, that all persons who hold title to lands within said limits by virtue of any grant made by any ayun-
17 tamiento, town council, alcalde, or justice of the peace of the former pueblo of San Francisco, before the seventh day of July, one thousand eight hundred and forty-six, or grants to lots of lands lying east of Larkin street and northeast of Johnston street, made by any ayuntamiento, town council, or alcalde of said pueblo, since that date and before the incorporation of the city of San Francisco by the State of California; and which grant, or the material portion thereof, was registered, or recorded, in a proper book of record deposited in the office, or custody, or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. one thousand eight hundred and fifty; or by virtue of any conveyance duly made by the commissioners of the funded debt of the city of San Francisco, and recorded on or before the first day of January, one thousand eight hundred and fifty-five, shall, for all the purposes contemplated by this ordinance, be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees.

18 § 3. The patent issued or any grant made by the United States to the city shall inure to the several use, benefit, and behoof of the said possessors, their heirs and assigns, mentioned in the preceding section, as fully and effectually, to all intents and purposes, as if it were issued or made directly to them individually and by name.

§ 4. The city, however, as a consideration annexed to the next two preceding sections, reserves to itself all the lots which it now occupies or has already set apart for public squares, streets, and sites for school-houses, city-hall, and other buildings belonging to the corporation; and also such lots and lands as may be selected and reserved for streets and other public purposes, under the provisions of the next succeeding sections.

§ 5. The city shall have the right to proceed to lay out and open streets, as soon as the corporation may deem it expedient, in that part of the city west of Larkin street and southwest of Johnston street, and reserves the right to take possession of such lands as it may be necessary to occupy for that purpose, without compensation, and to assess in the manner provided by the present or any existing charter
19 of the city, upon the lands bounded on such streets, the whole expense of laying out, opening, grading, and constructing the same; and payment of the costs of said improvements shall be deemed a charge upon the lands mentioned in this section to which the city of San Francisco relinquishes her right and title by the second and third sections of this ordinance.

§ 6. The city shall also have the right to select and set apart from the lands west of Larkin street and southwest of Johnston street as many lots, not exceeding one hundred and thirty-seven and a half feet square each, as the mayor and common council may by ordinance determine to be necessary for sites for school-houses, hospitals, fire-engine houses, and other public establishments necessary and proper for the use of the corporation; and may lay out and reserve upon the said lands, at convenient and suitable points and distances, public squares, which shall not embrace more than one block, corresponding in size to the adjoining blocks: Provided, that the selection shall be made within six
20 months from the time of the passage of this ordinance; and that the city shall not, without due compensation, occupy for the purposes mentioned in this section, after the laying out the streets aforesaid, more than one-twentieth part of the land in the possession of any

one person; and that such possessor shall voluntarily assent thereto, or, refusing to do so, shall not be entitled to the benefit of any concession contained in the second and third sections of this ordinance.

§ 7. The lot and lands reserved for the use of the corporation under the provisions of the next preceding section shall be selected in localities likely to be most convenient and suitable for their respective uses, and in such proportion to the quantity in the possession of the respective occupants as to make the apportionment as nearly equal as circumstances will admit.

§ 8. The selection of said lands and lots shall be made by a commission to consist of three persons, who shall be chosen by the common council, in joint convention, who shall report the same to the common council for its approval; and, upon such approval, deeds of release to the corporation for the lands thus selected shall be executed, ac-
21 knowledged, and recorded, in which deeds shall be specified the uses for which they are granted, reserved, and set apart respectively.

§ 9. Although the city hereby renounces in favor of the actual possessors, in accordance with the provisions of section second, any right or claim of its own, nothing in this ordinance is intended to prejudice any other outstanding title to the said lands adverse to the said possessors.

§ 10. Application shall be made to the legislature to confirm and ratify this ordinance, and to Congress to relinquish all the right and title of the United States to the said lands, for the uses and purposes hereinbefore specified.

§. 11. Nothing contained in this ordinance shall be construed to prevent the city from continuing to prosecute to a final determination her claim now pending before the United States Land Commission for pueblo lands, for the several use, benefit, and behoof of the said possessors mentioned in section two, as to the lands by them so possessed,
22 and for the proper use, benefit, and behoof of the corporation as to all other lands not hereinbefore released and confirmed to the said possessors.

§ 12. That all ordinances or parts of ordinances conflicting with this ordinance or any of its provisions be, and the same are hereby, repealed.

Approved June twentieth, one thousand eight hundred and fifty-five.

S. P. WEBB, *Mayor.*

And whereas the said common council passed another ordinance, approved by the mayor of said city September twenty-seventh, A. D. one thousand eight hundred and fifty-five; which last-mentioned ordinance is in the words and figures following, to wit:

Number eight hundred and forty-five. Ordinance providing for selecting and designating public squares and reservations for hospitals, fire-engines, and school purposes, and for adopting the plan of streets in the western and southwestern portion of the city according to the provisions of ordinance number eight hundred and twenty-two, and confirmatory of said ordinance number eight hundred and twenty-two.

23 The people of the city of San Francisco do ordain as follows:

§ 1. Under and by virtue of the provisions of the ordinance of the common council number eight hundred and twenty-two, entitled "An or-

dinance for the settlement and quieting of land-titles in the city of San Francisco, approved June twentieth, one thousand eight hundred and fifty-five," the board of aldermen and board of assistant aldermen shall meet in joint convention, at their next regular meeting after the passage of this ordinance, and proceed to elect three commissioners, who shall have the powers and proceed to discharge the duties specified in section eight of said ordinance number eight hundred and twenty-two.

§ 2. It shall be the duty of the city surveyor, acting in conjunction with the said commissioners and with their concurrence, to furnish, by way of recommendation, to the common council, within one month from the date of their appointment, a plan for the location and dimensions of the streets to be laid out within the city limits west of Larkin
24 and southwest of Johnston streets; upon which plan shall also be designated the lots and grounds selected by the said commissioners for the use of the city, under the provisions of the aforesaid ordinance number eight hundred and twenty-two: Provided, that the compensation of said commissioners shall not exceed the sum of one hundred dollars each, payable when the common council may legally make an appropriation therefor.

§ 3. The said ordnance number eight hundred and twenty-two, referred to in the preceding section one, is hereby reordained, ratified, and confirmed in all its parts.

Approved September twenty-seventh, one thousand eight hundred and fifty-five.

JAMES VAN NESS, *Mayor.*

And whereas, in pursuance of the aforesaid ordinances, commissioners were appointed by the common council, who, in conjunction with the city surveyor of said city, agreed upon and reported for the approval of the common council a plan for the location of streets, public
25 squares, and lots for public uses, to be laid out west of Larkin and southwest of Johnston streets in said city, accompanied by a map of the same; which said plan and map was, by the justices of the peace, exercising the powers of a board of supervisors of the city and county of San Francisco, adopted, approved, and ratified by an order bearing date the sixteenth day of October, A. D. one thousand eight hundred and fifty-six, which is in the words and figures following, to wit:

The board of supervisors of the city and county of San Francisco do ordain as follows:

§ 1. That the plan or map of the western addition, reported by the commissioner created under an ordinance of the last common council of the city of San Francisco, be adopted by this board, and be declared to be the plan of the city in respect to the location and establishment of streets and avenues and the reservation of squares and lots for public purposes in that portion of the then incorporated limits of said city lying west of Larkin and southwest of Johnston streets.

26 Be it therefore enacted, that the within and before recited order and ordinances be, and the same are hereby, ratified and confirmed, and all the land entered or to be entered in the United States Land Office, in pursuance of section one of the first-recited of said ordinances, in trust, shall pass and inure to and be deemed to have immediately vested in the occupants thereof, for their several use and benefit, according to their respective interests, in execution of the trust designated in an act of Congress, entitled "An act for the relief of citizens of towns upon the public lands of the United States under certain circumstanees," approved May twenty-third, one thousand eight

hundred and forty-four, as extended and applied by an act of Congress entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March third, one thousand eight hundred and fifty-three; and it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited,
27 without further proof, as fully and effectually, to all intents and purposes, as if they were public acts of the State legislature.

SEC. 2. That the grant or relinquishment of title made by the said city in favor of the several possessors by sections two and three of the ordinance first above recited shall take effect as fully and completely for the purpose of transferring the city's interest, and for all other purposes whatsoever, as if deeds of release and quitclaim had been duly executed and delivered to and in favor of them individually and by name; and no further conveyance or other act shall be necessary to invest the said possessors with all the interest, title, rights, benefits, and advantages which the said order and ordinances intend or purport to transfer or convey, according to the true intent and meaning thereof: Provided, That nothing in this act shall be so construed as to release the city of San Francisco or city and county of San
28 Francisco from the payment of any claim or claims due or to become due this State against said city or city and county, nor to effect or release to said city and county any title this State has or may have to any lands in said city and county of San Francisco.

Seventh. An act of Congress was passed, and on July 1, 1864, approved, entitled "An act to expedite the settlement of titles to lands in the State of California," section 5 of which act is as follows:

"SEC. 5. And be it further enacted, that all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating said city, passed by the legislature of the State of California on the fifteenth of April, one thousand eight hundred and fifty-one, are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city ratified by an act of the legislature of the said State approved on the eleventh of March, eighteen
29 hundred and fifty-eight, entitled "An act concerning the city of San Francisco, and to ratify and confirm certain ordinances of the common council of said city," there being excepted from this relinquishment and grant all sites or other parcels of lands which have been or now are occupied by the United States for military, naval, or other public uses, or such other sites or parcels as may hereafter be designated by the President of the United States within one year after the rendition to the General Land Office by the surveyor-general of an approved plat of the exterior limits of San Francisco, as recognized in this section in connection with the lines of the public surveys; And provided, That the relinquishment and grant by this act shall in no manner interfere with or prejudice any bona fide claims of others, whether asserted adversely under rights derived from Spain, Mexico, or the laws of the United States, nor preclude a judicial examination and adjustment thereof."

30 Eighth. That at the time of the alleged grant George Donner was an infant, aged about ten years.

Conclusions of law.

That defendant S. O. Houghton, by virtue of said grant to said Donner, the said ordinance of the city of San Francisco, and the said acts of the legislature of California and of Congress, and the said mesne conveyances from said Donner to him, is the owner of and has the legal title to said demanded premises, and that the defendants are lawfully and rightfully in the possession thereof.

II. That the statutes of limitations have not run in favor of plaintiff, by reason of his own and his grantor's possession, from 1851 or 1852 to May 8th, 1867, and that such possession gives him no title as against defendants.

And judgment is therefore ordered in favor of defendants and for all costs of this action.

31 (Signed) LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

(Endorsed:) Filed 31 Jan., 1873, as of 21 Oct., 1872, by order of judge. L. S. B. Sawyer, clerk.

32 In the circuit court of the United States of the ninth judicial circuit in and for the district of California.

DANIEL PALMER
vs.
JOSEPH W. LOW ET AL. } No. 1044.

Judgment.

This cause having come on regularly for trial on the 12th day of September, A. D. 1872, being a day in the June term, 1872, of said court, before the court sitting without a jury, a trial by jury having been expressly waived by written stipulation of counsel for the respective parties, duly filed with the clerk of said court, Barstow, Stetson & Houghton, esqs., appearing on behalf of plaintiff, and S. O. Houghton, esq., and John Reynolds, esq., on behalf of defendants, and the trial having been proceeded with upon the 13th and the 26th days of said September, and witnesses on behalf of plaintiff and of defendants having been sworn and examined, and the cause, after arguments of counsel, having been submitted to the court for consideration and decision, and the court, after due deliberation, having, on the 21st day of October, A. D. 1872,
33 being a day in the October term, 1872, of said court, filed its finding in writing, and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and the finding aforesaid, it is considered by the court that the plaintiff take nothing by this action; that the defendants go hereof without day, and that the defendants do have and recover of and from Daniel Palmer, plaintiff, their costs in this behalf expended, taxed at twenty-eight $\frac{20}{100}$ dollars.

Judgment entered the 21st day of October, 1872.

L. S. B. SAWYER, *Clerk.*

A true copy of an original entered in the therein-entitled cause in judgment-register C. L., No. 1, p. 548.

Attest, &c.:

L. S. B. SAWYER, *Clerk.*

(Endorsed:) Filed 21 October, 1872. L. S. B. Sawyer, clerk.

34 *Certificate to judg't-roll.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment-roll in the cause entitled "Daniel Palmer vs. Joseph W. Low et al."

Attest my hand and the seal of said circuit court this 31st day of January, A. D. 1873.

[SEAL.]

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE,
Deputy Clerk.

(Endorsed:) Judgment-roll. Filed January 31st, 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

35 Circuit court of the United States for the district of California, ninth judicial circuit.

DANIEL PALMER
v.
JOSEPH W. LOW ET AL.

Bill of exceptions.

Be it remembered that, at the June term, A. D. 1872, of the said court, holden in and for the district of California, at the city and county of San Francisco, on the twelfth, thirteenth, and twenty-sixth days of September, A. D. 1872, the above-entitled action came on to be tried before the court, a jury having been waived by the parties respectively; and the defendants, to maintain the issues on their part, offered in evidence an entry on page 179, book A, of original grants, from the custody of the county recorder of the city and county of San Francisco, which is as follows, viz:

Lot No. 39.

36 Whereas George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore I, the undersigned alcalde, do hereby give, grant, and convey unto the said George Donner, his heirs and assigns forever, lot number thirty-nine (39), one hundred varas square, in the vicinity of the town of San Francisco, subject to all the rules and regulations governing in such cases.

In testimony whereof I have hereunto set my hand as alcalde this nineteenth day of July, A. D. 1847.

GEORGE HYDE,
1*st Alcalde.*

In connection with the offer of said entry, said book A was satisfactorily proven to be a part of the archives of the office of the recorder of the city and county of San Francisco, and it was admitted by counsel on the trial that said book is the original "book A" of alcalde grants in the custody of the city and county recorder, and known in the office as one of the books turned over to the county recorder's office

in pursuance of the directions of the statutes of California, as
37 one of the books of the former alcalde's office. It was also satisfactorily proved that the signature George Hyde to said alcalde entry of grant or memorandum of grant is in the handwriting of George Hyde, and is his genuine signature, and that the said Hyde was, at the date of said entry, acting alcalde of San Francisco.

To the introduction of which entry in book A plaintiff's counsel objected, on the ground that it was incompetent, irrelavent, and immaterial. Also on the ground that it is not primary evidence, or the best evidence, of a grant having been made to George Donner. It is but secondary evidence; that there has been no evidence to lay the foundation for the introduction of this secondary evidence; that there has been no proof of the loss or destruction of the original instrument of which the said entry on page 179 is a mere memorandum; that the entry in book A of original grants, at the page indicated, is a mere memorandum made by the alcalde; that the grant should have been made and signed by both parties, the grantor and grantee, and should
38 have been attested by parties as witnesses of the fact. That the whole proceeding should have been set out on that book; that if it be a mere memorandum-book it was indicative merely that there was some other instrument which had to be executed and delivered, and which is primary evidence in the case.

These objections were overruled by the court, and exception taken by counsel for plaintiff then and there.

It was proved by the evidence in the case that George Donner, the alleged grantee, was an infant of about the age of ten years at the date of the entry in said book A, July 19, 1847; and plaintiff contended that such infant was incapable of binding himself to perform the conditions upon which grants of municipal lands were made by alcaldes, and was not competent to obtain or receive, and was incompetent to receive a grant under the Mexican laws; but the court held and ruled that such grant to an infant of that age was good and valid, or, if not, that the evidence is admissable as tending to show a grant by an alcalde of the former pueblo of San Francisco before the incorporation of the city of
39 San Francisco by the State of California, of a lot being east of Larkin street and northeast of Johnston street, and which grant, or a material portion thereof, was registered or recorded in a book of record deposited in the office or custody or control of the recorder of the county of San Francisco, on or before the third day of April, A. D. 1850, within the meaning of the ordinance, and the act of the legislature of the State of California, and the act of Congress confirming the same, mentioned in the findings in this case, to which plaintiff's counsel then and there duly excepted.

Also, there was some evidence, independent of the grant, tending to prove that the municipal fees were paid, and the plaintiff contended that the payment of the municipal fees was an indispensable prerequisite to the exercise of the power of the alcalde to make a grant, and that there was no power in the alcalde to make a grant without the payment of the municipal fees; but the court found that the payment of such fees was sufficiently shown by the grant, and the other evidence introduced, above referred to, and that no other proof was
40 necessary, to which ruling plaintiff's counsel then and there duly excepted.

Also, there was some evidence, other than what appeared from the grant itself, tending to prove that the said grant was delivered to the said George Donner, or to some one for his use and on his behalf, and the court found that the grant itself, and the other evidence above re-

ferred to, was sufficient evidence of delivery, and that no other proof thereof was necessary, to which ruling plaintiff's counsel then and there duly excepted.

In testimony whereof, and of the truth of the foregoing bill of exceptions, I, the said judge, before whom the said cause was tried, have hereunto set my hand and seal this 20th day of February, A. D. 1873.

(Signed) LORENZO SAWYER, [L. S.]
United States Circuit Judge, Ninth Judicial Circuit.

41 (Endorsed:) Filed 21st February, A. D. 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

42 *Bond.*

In the Supreme Court of the United States of America.

DANIEL PALMER
vs.
JOSEPH W. LOW ET AL.

Know all men by these presents that we, Richard F. Knox, of the city and county of San Francisco, and Charles Clayton, of said city and county, State of California, are held and firmly bound unto Joseph W. Low, Charles L. Kellogg, S. O. Houghton, George B. Bradford, Cyrus Palmer, C. W. Kinsman, W. L. Palmer, I. W. Knox, Charles Clayton, and S. H. Harmon, in the sum of five hundred dollars, to be paid to the said Joseph W. Low, Charles L. Kellogg, S. O. Houghton, George B. Bradford, Cyrus Palmer, C. H. Kinsman, W. L. Palmer, I. W. Knox, Charles Clayton, and S. H. Harmon, their executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this 21st day of October, A. D. 1874.

43 Whereas the above-named Daniel Palmer has prosecuted a writ of error to the Supreme Court of the United States of America, to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of California:

Now, therefore, the condition of this obligation is such, that if the above-named Daniel Palmer shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

RICHARD F. KNOX. [SEAL.]
CHA'S CLAYTON. [SEAL.]

Signed, sealed, and delivered in presence of—
JOS. F. O'BEIRNE.

UNITED STATES OF AMERICA,
District of California:

Richard F. Knox and Charles Clayton, being duly sworn, each for himself, deposes and says that he is a freeholder in said district

44 and is worth the sum of five hundred dollars exclusive of property exempt from execution, and over and above all debts and liabilities.

RICHARD F. KNOX.
CHA'S CLAYTON.

Subscribed and sworn to before me this 21st day of October, A. D. 1874.

JOS. F. O'BEIRNE,
U. S. Comm'r, Cal.

(Endorsed:) The form of the within bond and the sufficiency of the sureties thereon are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed 21st Oct'r, 1864. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

44*a* In the Supreme Court of the United States of America.

DANIEL PALMER
vs.
JOSEPH W. LOW ET AL.

Know all men by these presents that we, Wales L. Palmer and Horace B. Angell, both of San Francisco, State of California, are held and firmly bound unto Joseph W. Low, Charles L. Kellogg, and S. O. Houghton in the sum of five hundred dollars, to be paid to the said Joseph W. Low, Charles L. Kellogg and S. O. Houghton, their executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this third day of May, A. D. 1877.

Whereas the above-named Daniel Palmer has prosecuted a writ of error to the Supreme Court of the United States of America to
44*b* reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of California:

Now, therefore, the condition of this obligation is such, that if the above-named Daniel Palmer shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

WALES L. PALMER. [SEAL.]
HORACE B. ANGELL. [SEAL.]

Signed, sealed, in presence of—
A. D. GRIMWOOD.

UNITED STATES OF AMERICA,
District of California, ss:

Wales L. Palmer and Horace B. Angell, being duly sworn, each for himself deposes and says that he is a freeholder in said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

WALES L. PALMER.
HORACE B. ANGELL.

Subscribed and sworn to before me this 3rd day of May, A. D. 1877.

A. D. GRIMWOOD,
Commissioner U. S. Circuit Court, District of California.

44*c* The form of the within bond and the sufficiency of the sureties thereon are hereby approved.

LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

(Indorsed:) 1877. Octo. term, Supreme Court. No. 291. Daniel Palmer, pl'ff in error, vs. Joseph W. Low et al., def'ts in error. Bond on writ of error. Filed 16th May, 1877.

15 THE UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, in the ninth judicial circuit, do hereby certify that the foregoing forty-four written pages, numbered from 1 to 44, both inclusive, contain a full, true, and correct copy of the record and all proceedings in the therein-entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 27th day of September, A. D. 1875.

[SEAL.] L. S. B. SAWYER, *Clerk.*
By J. F. O'BEIRNE,
Deputy Clerk.

(Indorsement on cover:) No. 291. Daniel Palmer, plaintiff in error, vs. Joseph W. Low, Charles L. Kellogg, S. O. Houghton, George B. Bradford, Cyrus Palmer, C. W. Kinsman, W. L. Palmer, J. W. Knox, Cha's Clayton, & S. H. Harmon. California C. C. U. S. Filed 26th October, 1875.

No.....

In the Supreme Court

OF THE

UNITED STATES.

PALMER

VS.

LOW ET ALS.

BRIEF FOR DEFENDANTS.

S. O. HOUGHTON, - - - For Defendants in Error.

SAN JOSE:

Alex. P. Murgotten, Printer, Commercial Bank Building.

1878

In the Supreme Court

—OF THE—

UNITED STATES.

DANIEL PALMER,
Plaintiff in Error,

vs.

JOSEPH W. LOW ET ALS.,
Defendants in Error.

Brief for Defendants.

Statement.

This action is ejectment. The claim of plaintiff is founded upon the prior possession of his grantors.

The defendants are in possession, holding under

a grant made by the Alcalde of the Pueblo of San Francisco, July 19th, 1847.

The premises in controversy are a part of one hundred vara lot number thirty-nine, situated in the City of San Francisco. Said lot was granted by George Hyde, Alcalde of the Pueblo of San Francisco, to George Donner, by grant dated July 19th, 1847, which was duly recorded in a proper book of record in the office of said Alcalde, and duly delivered to said Donner, and said record book deposited in the office of, and under the control of the County Recorder of the City and County of San Francisco before the 3d day of April, 1850, where it has ever since remained.

The said lot lies east of Larkin street and northwest of Johnston street, and by operation of the Van Ness Ordinance, an Act of the Legislature of the State of California, and an Act of Congress, said grant was confirmed to said Donner.

The defendant S. O. Houghton had acquired and owned and held all the title of Donner to said lot when this action was commenced, and the other defendants were in the occupation of the part in controversy as his tenants and lessees.

In 1851 or 1852, the grantors of the plaintiff intruded upon that part of said lot in controversy

without title, and they and plaintiff remained in possession until May 8th, 1867, when the grantor of the defendant Houghton received possession thereof, since which date he and said Houghton and his tenants have continued in possession under said grant to said George Donner, and have excluded the plaintiff and his grantors therefrom.

The plaintiff claims that the possession of his grantors vested them with title by force of the Statute of Limitations, and that the proof of a grant to George Donner under which defendants hold possession was insufficient.

ARGUMENT.

I.

The Alcalde was the chief executive officer of the Pueblo of San Francisco, and as such had authority to make the grant.

Merryman vs. Bourne, 9 Wal., 601–602.

Hart vs. Burnett, 15 Cal., 530.

Payne vs. Treadwell, 16 Id., 221.

White vs. Moses, 21 Id., 39.

II.

The entry in Book A was an original document

—a public record—of an official act of the Alcalde, required by law to be kept by him, and was primary evidence of the making of the grant to George Donner.

Donner vs. Palmer, 31 Cal., 508–509.

Downer vs. Smith, 29 Id., 114.

III.

The fact that Donner was an infant did not render him incompetent to take title under the grant. Nor was it necessary to prove payment by or for him of municipal fees to establish the validity of the grant.

Donner vs. Palmer, Supra, 516–518.

It is shown by the bill of exceptions that proof was adduced showing payment of the municipal fees, and also showing a delivery of the grant.

Trans., pp. 13–14.

IV.

Whether the grant made by the Alcalde was valid and sufficient to vest title in the grantee or otherwise is wholly immaterial, as all defects in the grant, if any, were cured by the Van Ness Ordinance of City of San Francisco, the Act of

the Legislature of California, and the Act of Congress set out in the findings.

Trans., pp. 6–10.

Merryman vs. Bourne, Supra, 602.

V.

The grantors of plaintiff acquired no right by virtue of the Statute of Limitations.

This point is very fully discussed in the opinion of the Judge of the Court below; and to that and the cases therein cited the attention of this Court is invited.

2 Sawyer's U. S C. R., 248.

It is respectfully submitted that the judgment should be affirmed.

S. O. HOUGHTON,
For Defendants in Error.

In the Supreme Court of the United States.

OCTOBER, TERM, 1877.

No. 291.

DANIEL PALMER
vs.
JOSEPH W. LOW ET AL. } Error to the Circuit Court for the District of California.

STATEMENT.

Daniel Palmer, plaintiff both below and in error here, brought ejectment against Joseph W. Low et al. to recover possession of a certain tract of land situated in the city of San Francisco, describing it by metes and bounds, and as a portion of 100 vara, lot No. 39, as laid down upon the official map of the city and county of San Francisco. He averred a right of possession as owner under a good title, and a wrongful ouster and continued withholding by the defendant. Defendant pleaded a general and special denial of the averments of the complaint, and as further special matter of defence set up the Statute of Limitations. A jury having been waived the case was tried before the court, and upon its findings of fact and conclusions of law judgment was entered for defendant. To reverse same writ of error has been prosecuted to this Honorable Court.

The claim of title of the respective parties is as follows:

1. Plaintiff's title:

The grantors of the plaintiff entered into the possession of the demanded premises without title about the year 1851 or 1852, and they and the plaintiff continued in the exclusive and adverse possession thereof down to the 8th

day of May, 1867, when the grantor of defendant, S. O. Houghton, was placed in the possession thereof by the sheriff of the city and county of San Francisco under legal process issued in the case of George Donner *vs.* Cyrus Palmer et al., to which suit neither the plaintiff nor any of his grantors deriving title from any party to said suit subsequently to the commencement thereof, was a party. The second section of an ordinance of the Common Council of the city of San Francisco, passed on the 20th June, 1855.—

"Relinquished and granted all the title and claim which the city held to the land within her corporate limits, as defined by the charter of 1851, with certain exceptions, to the parties in the actual possession thereof, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the Common Council, or if interrupted by a trespasser or intruder had been or might be recovered by legal process."

Townsend *vs.* Greeley, 5 Wall., 332.

The plaintiff or his grantors were in such actual possession of the premises in controversy at the times designated by said ordinance, which ordinance was confirmed by an act of the State Legislature approved March 11, 1858. Both the city ordinance and the confirmatory act of the State Legislature will be found on pages 6, 7, and 8 of the printed Transcript of Record, and by virtue thereof the plaintiff in error is entitled to recover unless the demanded premises are excluded by proviso thereto hereinafter to be more particularly mentioned. The plaintiff also claims title by reason of uninterrupted and adverse possession of said premises continued beyond the period required by the California Statutes of Limitation.

2. The defendant's title:

His source of title is an alleged grant of the lot in ques-

tion on the 19th July, 1847, by George Hyde, acting alcalde of the Pueblo of San Francisco, to George Donner, then an infant of about ten years; the delivery thereof by said alcalde to said Donner; the registering and recording of the material portion thereof in a proper book of record deposited in the office and in the custody and control of the recorder of the county of San Francisco before the 3d day of April, A. D. 1850, and which has so continued to remain from said date to present time, and the confirmation created by the proviso to section 2 of the city ordinance of June 20, 1855, as confirmed by the State act of March 11, 1858. Through mesne conveyances the defendant S. O. Houghton acquired all the right, title, and interest of said Donner in and to said lot, and the part thereof which is in controversy in this action was occupied by the other defendants as the tenants and lesees of said Houghton. The proviso to said section 2 is in the words following, viz.:

"Provided that all persons who hold title to lands within said limits by virtue of *any grant* made by any ayuntamiento, town council, alcalde, or justice of the peace of the former Pueblo of San Francisco before the 7th day of July, 1846, or *grants* to lots of land lying east of Larkin street and northeast of Johnson street, *made* by any ayuntamiento, town council, or alcalde of said Pueblo since that date and before the incorporation of the city of San Francisco by the State of California, and *which grant or the material portion thereof was registered or recorded* in a proper book of record deposited in the office or custody or control of the recorder of the county of San Francisco on or before the 3d day of April, A. D. 1850, * * * * shall for all the purposes contemplated by this ordinance be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees."

The premises in question lie east of Larkin street and northeast of Johnson street, and if in accordance with

established rules of evidence the defendant's claim of title is brought within the letter and the intent of the foregoing proviso the judgment below must be affirmed, unless the plaintiff has otherwise acquired a good title under the Statute of Limitations.

3. The evidence and rulings thereon by court below:

The plaintiff proved continuous and peaceable possession by himself and grantors from 1851 or 1852 to May 8, 1867, and he also invoked the California Statutes of Limitation as against the defendants; but the court below held that the Statutes of Limitation did not run in favor of the plaintiff by reason of said possession, and that same gave him no title as against defendants.

To maintain the issues on their part the defendants offered in evidence an entry on page 179, Book A, of original grants from the custody of the county recorder of the city and county of San Francisco, which is as follows:

"*Lot No.* 39.

"Whereas George Donner has presented a petition soliciting for a grant of a title to a lot of ground as therein described, therefore, I, the undersigned alcalde, do hereby give, grant, and convey unto the said George Donner, his heirs and assigns forever, lot No. 39, one hundred varas square, in the vicinity of the town of San Francisco, subject to all the rules and regulations governing in such cases.

"In testimony whereof I have hereunto set my hand as alcalde this 19th day of July, A. D. 1847.

"GEORGE HYDE,
"*First Alcalde.*"

Said Book A was proven to be a part of the archives of said county recorder, and it was admitted to be the original "Book A" of alcalde grants turned over to said recorder as one of the books of the former alcalde's office. It was also proved that the signature to said alcalde entry of grant or memorandum of grant was the genuine signature of George Hyde, and that said Hyde was at the date of said

entry acting alcalde of San Francisco. Upon this showing the court below admitted this entry of grant or memorandum of grant in said Book A as primary evidence of a grant having been made to said George Donner.

It was also proved that George Donner, the alleged grantee, was an infant of ten years at the date of the entry in said Book A, July 19, 1847; but the court below held that such grant to an infant was good and valid.

It was also shown that the payment of certain municipal fees by the grantee was a condition precedent by the Mexican law to the delivery of an alcalde grant; but the court below held that the payment of such fees was sufficiently proven by the grant, and that no other proof was necessary.

There is no proof in the transcript of record to show that a delivery of the grant to George Donner was ever made; but the court below held in substance that the grant itself as proven by the memorandum in Book A was sufficient evidence of delivery, and that no other proof was necessary.

Assignment of Errors.

The judgment of the Circuit Court should be reversed for the following reasons, viz.:

1. Because under both the statute law of Mexico applicable to the establishment of Pueblos, and the unwritten law of custom which prevailed both before and after the American conquest, an alcalde grant should have been made and signed by both grantor and grantee; it should have been attested by parties as witnesses of the fact; it should have been delivered to the grantee after full compliance with all antecedent requirements of statute, whether by personal qualifications of the grantee, payment of municipal fees, delivery to the grantee of the original conveyance, or fully setting out the whole proceeding upon the proper book of record. If after the

American conquest, and before the organization of the State government, alcaldes had power to make valid grants of Pueblo lots, they did so only upon the theory of succession to the Mexican Pueblo, and they were bound to exercise their functions in exact accordance with the laws or customs which created and defined their office.

2. Because the granting part of the Van Ness ordinance clearly conveys the title of the city to the parties in actual occupation—the plaintiffs in this case; and if the defendant relies upon the proviso to take the demanded premises out of that grant, he must bring himself *clearly* within the language and intent of that proviso. It in express language requires proof of both a grant *and* the recording of same, or of the material portion thereof. Proof of only one of these things is not sufficient, and one can be eliminated as well as the other.

3. Because the introduction in evidence of the entry in Book A was incompetent, irrelevant and immaterial. It was not primary evidence, nor the best evidence of a grant having been made to George Donner. It was at best but secondary evidence, and there was no foundation laid for its introduction by proof of the loss or destruction of the original instrument of which the said entry in Book A was a mere memorandum.

If it was a mere memorandum, it was merely indicative that there was some other instrument which had to be executed and delivered, and which was primary evidence in the case.

4. Because by reason of the uninterrupted and peaceable possession of the demanded premises by the plaintiff and his grantor from 1851 or 1852 to May 8, 1867, the Statutes of Limitation ran in favor of said plaintiff, and such possession gave plaintiff perfect title as against defendants.

ARGUMENT.

This case differs widely from any heretofore adjudicated by this Court and affecting Pueblo titles in San Francisco. Previous cases have settled the inferiority of so-called alcalde titles to Government reservations, or to private land claims within the asserted limits of the Pueblo, upon the ground that the latter were excepted, both by the express terms of the decrees of court and of the acts of Congress, from confirmation to the Pueblo.

Grisar *vs.* McDowell, 6 Wall., 369.

Lynch *vs.* Bernal, 9 Id., 320.

Also, that the municipal laws held by the city of San Francisco as successor to the former Pueblo of Yerba Buena, were not held in absolute property, but in trust for its inhabitants; and were not, *therefore*, subject to seizure and sale under judgment and execution against the trustee.

Townsend *vs.* Greeley, 5 Wall., 332.

Also, that the municipal laws relating to alcalde grants either continued in force after the American conquest, and until changed by the legislative authority of the State, or that a new and after acquired title was given to the alcalde grant claimants by subsequent confirmatory acts of the City Council and State Legislature.

Merryman *vs.* Bourne, 9 Wall., 598.

Also, that prefects in California, however appointed or elected, had no power after the conquest of the country to grant the unappropriated lands of the Pueblos; and that such titles, unless assisted by legislation, cannot be regarded as valid.

Alexander *vs.* Roulet, 13 Wall., 387.

None of these decisions settle the present case. Although the issues involved have been repeatedly before the State courts in California, wherein the decisions have

been far from uniform, yet this Court has now before it, for the first time, a controversy between individual claimants for the city title—the one claiming by a continued and peaceable occupation of nearly a score of years (from 1851 to 1867), as confirmed by appropriate legislation; and the other claiming by a paper title from an alcalde *after* the conquest, asserted for the first time in 1867, and dependent more or less upon the same legislative confirmation.

By repeated decisions it has been settled that on the 7th of July, 1846, the United States succeeded in California to the rights and authority of the government of Mexico. Before that date the Pueblo of San Francisco existed in some form, and under the Mexican laws had certain rights in the territory within certain prescribed limits, known as Pueblo lands. It had an ayuntamiento (or town council) and an alcalde. The latter was its chief executive officer, and as such had limited authority to make grants of the Pueblo lands under prescribed conditions and forms. Furthermore, by the laws of Mexico, upon the establishment of a Pueblo, its lands were to be formally assigned and measured off by the proper authorities; and until such definite assignment and segregation, the right or claim of the Pueblo was an imperfect one. In such imperfect form the government might refuse to recognize it at all; or might recognize it in a qualified form; or might burden it with conditions; or might restrict its area. And even after assignment or segregation the Pueblo title was only a qualified right to alienate portions of the land to its inhabitants for building or cultivation, and to use the balance for the common benefit; and this limited right of disposition and of use was in all particulars subject to the control of the general government. If, then, it be assumed that the title of defendant in error derives any force from the Mexican laws relating to Pueblo titles, we allege—

FIRST ERROR.

That the judgment below should be reversed:

Because under both the statute law of Mexico applicable to the establishment of Pueblos, and the unwritten law of custom which prevailed both before and after the American conquest, an alcalde grant should have been made and signed by both grantor and grantee; it should have been attested by parties as witnesses of the fact; it should have been delivered to the grantee after full compliance with all antecedent requirements of statute, whether by qualifications of the grantee, payment of municipal fees, delivery to the grantee of the original conveyance, or fully setting out the whole proceeding upon the proper book of record. If after the American conquest, and before the organization of the State government, alcaldes had power to make valid grants of Pueblo lots, they did so only upon the theory of succession to the Mexican Pueblo, and they were bound to exercise their functions in exact accordance with the laws or customs which created and defined their office.

a. The Statute Law of Mexico.

The principal statute relating to Pueblos is known as the "Plan of Pitic." It is found in the royal instructions of November 14, 1789, for the establishment of the town of Pitic, in the province of Sonora; which instructions were made applicable to all new towns thereafter established within the district under the commandante general, including California. This Plan of Pitic contemplated a settlement, already existing, of a number of persons, who all at once were to receive each his lot. (See secs. 2, 10, 15, 16, of the royal instructions of November 14, 1789.) They were to be *distributed* by a commissioner. The settlers were to cast lots to avoid difficulties, and the commissioner,

by section 17, was to make an unbound book (cuaderno) "in which shall appear the *original* steps or proceedings in relation to such distribution." By same section the commissioner was also to give to each settler (Poblador) a testimony or duly accredited document, which shall set forth with brevity, distinctness and clearness the extent and boundaries of the "solar" and "suertes" which may have been assigned him. It was expressly prescribed that *this testimony* or *instrument* should serve as *a title in ownership* to such settler, his children and descendants, reminding him that for this purpose it must be preserved; and that if the same by any involuntary accident should be lost, he could apply to the commissioner or to the ayuntamiento, from whom he could receive another similar instrument from the proceedings, which for this purpose remained in the archives.

Section 18 prescribes that "thus in the original pro-"ceedings of distribution, as in the certificates or titles in "fee which shall have been given to the settlers, the Com-"missioner shall make known that the town lots," &c., &c.; setting out specifically all the terms and conditions of the grant. The details of this plan were undoubtedly changed and modified by subsequent ordinances as to the terms and conditions of the grants; but so far as our research can determine, it was at all times left unaffected in its two main fundamental requirements—viz., the entry in the unbound book, and the delivery of a separate instrument to the grantee as the evidence "of his title in ownership." Municipal fees were prescribed as a condition precedent to the delivery of the grant; and unless these were duly paid, the alcaldes had no statutory power to make delivery. Whilst well-settled rules raise the presumption that all things necessary and requisite to have been done by a public officer prior to his performance of a statutory duty were done, yet in the absence of proof of delivery of a grant, as in this case, no such presumption

can attach. Allotment might have been made, and due record thereof in the cuaderno or unbound book; but complete investiture of title by delivery or otherwise could not lawfully occur, until the antecedent conditions of law had been complied with. Alcaldes were creatures of statute, and could lawfully act by grant or otherwise only within the authority of the statute. Payment of municipal fees is not proven in this case, nor delivery of the "testimony;" and they cannot be properly inferred from the record of unbound leaves, which was only the initiatory proceeding.

In this same line follows necessary proof of compliance with all the other antecedent terms and conditions of Pueblo grants, including the qualifications of the grantee. Upon this ground of want of qualifications, and as being contrary to the established policy of the Mexican law, alcalde grants to strangers and non-residents have been held by the California courts to be bad, and have been declared nullities.

Stevenson *vs.* Bennett.
Hart *vs.* Burnett, 15 Cal., 530.

So, also, a grant to a deceased party was declared a nullity, there being no party competent to receive title.

Montgomery *vs.* Beaven, 1Sawyer, 653.

The same reasoning is equally applicable to infants as being incapable of receiving grants. The Plan of Pitic dealt only with heads of families, and not with the members thereof. They were required under the law to exercise the elective franchise; and provision was made for the children receiving lots when they attained their majority. (Secs. 4, 9 and 15, Instructions of Nov. 14, 1789.) It being proven that the ancestor of defendant's title was an infant of ten years at date of the alleged alcalde grant, he was clearly incapable of receiving the grant, and it was a nullity.

b. The Custom or Unwritten Law of Mexico.

It is, however, beyond the reach of contradiction, and matter of history, that the "Plan of Pitic" was not pursued by the Mexican alcaldes in San Francisco. Grants were made in a very different manner, and quite repugnant to its requirements. A long established custom pursued by these alcaldes under Mexican rule, modified and superseded the "Plan of Pitic." This custom has been fully asserted by repeated decisions of the State courts, and is a matter of history.

See Dwinelle's Col. Hist. of San Francisco, Addenda, p. 111.

"And custom and usage, when once settled, are equivalent to law, though they may be comparatively of recent date."

Reynolds *vs.* West, 1 Cal., 326.
Strother *vs.* Lucas, 12 Pet., 410.

By the "Plan of Pitic" the entire proceedings were first entered in the official book, signed and attested in due form by the proper officer, and a copy or testimony was then delivered to the grantee. But by the custom which superseded the "Plan of Pitic" the *only* document containing the "entire proceedings" was "signed and attested in due form by the proper officer" and *delivered* to the grantee; whilst the record book contained a mere condensed copy or summary statement, and was often not signed at all. By the "Plan of Pitic," on loss of the first testimony, another like paper could be procured from the record. But in the custom which superseded the "Plan," a copy of the book would be a copy of a mere memorandum, and deficient in all the attributes of a title-paper. The conditions of grants by the "Plan," and by the superseding custom, were also entirely different. By the first the grantee was to keep horses and arms to defend the country; he was to build a house on the lot and occupy

it with his family for four years, during which period he could not alienate, hypothecate or encumber it, even for pious purposes. All these conditions were required to be expressly stated on the record, as well as in the title in fee delivered to the grantee.

But by the alcalde grants actually made according to the law of custom under the Mexican dominion, there were but two conditions, and these were omitted from the record, viz.:

1. To build a house and fence the lot within one year.
2. To conform to the police regulations.

Dwinelle's Col. Hist. of San Francisco, Addenda, pp. 162 to 165.

If, then, after the American conquest, and before the organization of the State government, alcaldes had power to make grants upon the theory of succession to the *customs* of the Mexican Pueblo, such grants must necessarily be proven by the production of the original conveyance, which alone contained the entire proceedings duly signed and attested, and not by a subsequent record in condensed or memorandum form.

This becomes even more clear when the universal custom of American alcaldes in grants after July 7, 1846, is considered. These American alcaldes knew little or nothing of the laws or customs of the Mexicans. They simply had a general idea that a power to grant in some form had been exercised; but they were entirely ignorant of the form or conditions. Naturally their practice invariably followed the American system of conveyancing. It is not necessary that we should remind this Court that such American system depended entirely upon the execution and delivery of the original deed to the grantee, and of a record in some form as simple notice to third parties.

This practice of the American alcaldes is fully set forth in
Donner *vs.* Palmer, 31 Cal., 500.
Montgomery *vs.* Beaven, 1 Sawyer, 653.

It is, however, matter of settled decision that—

"No assignment of lands was ever made to the Pueblo of San Francisco under the former government. Her claim or right to any lands being, therefore, an imperfect one, required the recognition and action of the new government before it could be turned into an absolute and indefeasible estate."
Grisar *vs.* McDowell, 6 Wall., 374.

In the earlier decisions, as in Merryman vs. Bourne, (9 Wall., 602,) the court appears to have considered these alcalde grants, made subsequent to the change of flag, as valid. But by the later decisions, as in Alexander *vs.* Roulet (13 Wall., 387,) and in Montgomery *vs.* Beaven (1 Sawyer, 653,) the doctrine is settled that—

"By the conquest of the country Mexican rule was displaced, and with it the authority of Mexican officials to alienate the public domain; and as a necessary consequence of this conquest, the Constitution of the United States, which gives to Congress the disposition of the public lands, was extended over the territory of California."

It follows that alcalde grants after the conquest would have been absolutely void, unless confirmed by subsequent legislation under this Government.

To ripen its imperfect or equitable right into a legal title, the Pueblo of San Francisco therefore presented its claim for confirmation under the act of March 3, 1851. It was confirmed by the Circuit Court May 18, 1865, with certain exceptions not material to present case; and by act of Congress of March 8, 1866, said decree, with sundry modifications, was finally confirmed. As Congress had

delegated jurisdiction over these cases to the courts, it had unquestioned power to resume jurisdiction at any time before final decree; and the effect of the act of 1866 was to insert its provisions into the decree of the Circuit Court, and to make the same final. Pending these proceedings upon confirmation, the Van Ness ordinance of June 20, 1855, and the confirmatory act of the State Legislature of March 11, 1858, were enacted; as, also, an act of Congress of July 1, 1864, confirming to the city all the title of the United States to the lands within the limits of the aforesaid Van Ness ordinance. It follows, then, that the title of the Pueblo, as confirmed by the decree of 1865 of the Circuit Court, and by the act of Congress of 1866, was vested in the individual claimants to whom it had been conveyed by the Van Ness ordinance of 1855, as confirmed by the State act of 1858, and the act of Congress of 1864. The claims to title, then, by either the plaintiff or defendant must rest exclusively upon the provisions of said Van Ness ordinance, as without same they would have been utterly void. Hence arises our second assignment of error.

SECOND ERROR.

The judgment must be reversed, because the granting part of the Van Ness ordinance clearly conveys the title of the city to the lot in question to the parties in actual occupation (the plaintiff in error), and if the defendant relies upon the proviso to take the demanded premises out of that grant he must bring himself *clearly* within both the language and the intent of that proviso. It in express language requires proof of both a grant *and* the recording of same, or of the material portion thereof. Proof of only one of these things is not sufficient, and one can be eliminated as well as the other.

The rule of construction relied upon is precisely laid

down in United States *vs.* Dickson. 15 Peters, 165, and is therein thus stated, viz.:

"Passing from these considerations to another, which necessarily brings under review the second point of objection to the charge of the court below, we are led to the general rule of law which has always prevailed and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause, *and those who set up any such exception must establish it as being within the words as well as within the reason thereof.*"

Now the enacting part of the Van Ness ordinance of June 20, 1855, relinquished and granted all the title and claim which the city held to the land within her corporate limits as defined by the charter of 1851 (including the lot in controversy) to the parties in the *actual* possession, by themselves or tenants, on or before the first day of January, 1855, provided such possession was continued up to the time of the introduction of the ordinance into the Common Council, or if interrupted by a trespasser or intruder had been or might be recovered by legal process. That concededly covers the plaintiff's claim, he having held actual, exclusive and adverse possession of the premises from 1851 or 1852 to 1867.

But to said enacting part a proviso was attached which declared that certain parties *under prescribed conditions* should for all the purposes of the ordinance be deemed to be the possessors of the land so granted, although the said lands may be in the actual occupancy of persons holding the same adverse to the said grantees. The conditions affecting this case were that such parties should hold title by a *grant made* by any ayuntamiento, town council, or alcalde of said Pueblo since July 7, 1846, and before the

incorporation of the city by the State Legislature, *and which grant or the material portion thereof was registered or recorded in a proper book of record*, &c.

As heretofore shown, these alcalde titles after the conquest were originally void. They depended entirely upon confirmatory or curative legislation by this Government. Such legislation might have rejected them *in toto*, or it might have restricted them, or it might have burdened them with any conditions. It confirmed them, but burdened with stated conditions. These were expressly recited to be a grant, and the record in a certain book of at least the material part thereof. The production of the grant alone would not have sufficed; a record thereof was also required. By parity of reasoning the record alone would not have met the proviso. A grant also was required to be produced. Both of these proofs were required by the proviso. Failing in either the claimant did not carve his case out of the enacting clause of the ordinance. The Common Council undoubtedly did not make this double requirement by haphazard. They clearly proceeded upon a well-digested theory of legislation. In a new and rapidly growing city they were undertaking to give peace to titles derived from the city. They dealt on the one hand with a population of every nationality, who were unfamiliar with Mexican laws or customs, and who from the necessities of the occasion had occupied the vacant lots of the magic city. They dealt on the other hand with parties who had invested capital in a community without laws, upon paper titles of doubtful character, but purporting to have emanated from municipal officers of supposed authority. In the crude organization which previously and even then existed the facilities for manufacturing such paper titles was illimitable. The occupation of parties was tangible and certain. It could not be forged. The paper titles were equally uncertain and easily manufactured. A grant might be made to order. A record might easily be

interpolated amongst the unbound leaves of the book of record, kept without much pretense of order and surrounded by few safeguards. Perfect security against fraud was impracticable, but reasonable security could be obtained by requiring *both* the grant and the record. Suppose a party relied upon production of a grant without record; would that have met the requirements of the proviso? Obviously not. With no more reason would the record without the grant be sufficient; and this is the more apparent because the record was not required to be a literal transcript of the grant. A material portion thereof was sufficient. The production of both was obviously designed as a check each upon the other.

The plaintiff in error proves beyond controversy the occupation, confirmed by the enacting part of the ordinance. The defendant in error fails to cut plaintiff off by reason of the proviso, because he has not brought himself within either its letter or intent. He has produced a memorandum of record, but he has not produced a grant, nor attempted to prove its loss or destruction.

THIRD ERROR.

The judgment must be reversed, because the introduction in evidence of the entry in Book A was incompetent, irrelevant, and immaterial. It was not primary evidence, nor the best evidence of a grant having been made to George Donner. It was at best but secondary evidence, and there was no foundation laid for its introduction by proof of the loss or destruction of the original instrument of which the said entry in Book A was a mere memorandum.

In this country the effect of records as matter of evidence is usually fixed by statute, but where no statutes govern (as in present case) the general rule is stated in 2 Phillips on Ev., Note, p. 490, to be that—

"The record can never be received to prove the original,

except upon the footing of mere secondary evidence at most. It is not like a common-law record of proceedings in court, for that is itself an original, and supposes no better evidence in existence; whereas a record or registry of a deed or other instrument is only a copy and presupposes an original."

This rule in the absence of statutory provisions, and so far as it relates to ordinary transactions like the relation which the register of deeds in the office of a county recorder bears to the conveyances therein recorded, is too familiar to this court to require discussion. It rests upon the great principle that the best evidence which the nature of the case admits of ought to be required, and unless the innocent destruction or loss of the original is proven no foundation is laid for the introduction of secondary evidence, and same is inadmissible.

Brooks *vs.* Marbury, 11 Wheaton, 79.

Is there anything peculiar to these alcalde grants which takes them out of the operation of the general rule, or is there any other general rule specially applicable to them, and which would make the entry in Book A primary evidence of the grant?

The rulings of the State courts in California have not been uniform upon this point. As late as Rice vs. Cunningham, 29 Cal., 492, the Supreme Court of that State held that:

"In such a case upon proof that the grant had been in fact made and afterwards lost, and upon further proof to the effect that the copy in the book was in fact a copy of such grant, the book might be received for the purpose of proving the contents of the grant."

In that case the proof was that after diligent search the original grant, if it ever existed, could not be found, and thereupon the entry in Book A was offered in evidence. Thereupon the court further said:

"For what purpose? It is announced for the purpose

of proving the contents of our grant. The reply is obvious. You have not yet shown that you ever had a grant, and until that has been done there can be no question about its contents. Hence at this stage of the case it was not receivable even in its assumed character, for the purpose of proving the contents of a lost grant; on the contrary, it would have been received only in its real character of an official record as *secondary* evidence of the grant itself showing that it had in fact been made, which was the real question in issue."

But in Donner *vs.* Palmer, 31 Cal., 500, the court substantially reverses the doctrine of Rice *vs.* Cunningham, and this opinion in 31 Cal. is the latest State authority upon this subject. By that decision, Book A was admitted as primary evidence, apparently upon the ground that it was in fact the grant itself. A minority opinion dissents from the reasoning of the court, but agrees in its conclusion upon the ground that Book A was primary evidence as being a book of public record.

A yet later decision by Mr. Justice Field, in the Circuit Court, Montgomery *vs.* Beaven, 1 Sawyer, 653, holds that whilst he cannot agree with the finding of the State court that Book A was the grant itself, yet it was admissible as primary evidence to prove the fact of a grant, because a public record.

The universal custom of both the Mexican and the American alcaldes so clearly followed the *making* and *delivery* of an original instrument as the grant, with subsequent record or memorandum of record, that no reasonable support can be urged for the finding of the State court in Donner *vs.* Palmer, that the record was the grant itself. If the admissiblity of Book A, as primary evidence, can be maintained at all, it must be upon the ground of a book of public record.

It is, of course, settled law that official registers or books, kept by persons in public office, in which they are required, whether by statute or by the nature of their

office, to write down particular transactions occurring in the course of their public duties and under their personal observation, are generally admitted as primary evidence of the facts therein recited. But it by no means follows that *all* official books are entitled to this rank.

The record books in the various county recorders' offices are "official records," but they are not *primary* evidence of the execution and delivery of a deed.

The registry of ships is an official record, yet it is not evidence of title.

1 Greenleaf Ev., sec. 494, and cases cited.
Cooper *vs.* South, 4 Taunt., 802.

Nor is it even proof of nationality.
Reusse *vs.* Meyer, 3 Camp., 475.

A sheriff's book, in which he makes entries of returns of executions, is an official record, but not primary evidence. The original entry on the writ is the best evidence.
Reid *vs.* Colcock, 1 Nott & McCord, 592.

A book, wherein mining claims are recorded according to mining rules, was held to be admissible as evidence of compliance with the rules of the mining district; and a particular entry of a transfer to be admissible to show compliance with the miners' rules requiring the recording of such transfers; but not as primary evidence of the fact of such transfer.
Atwood *vs.* Fricot, 17 Cal., 377.

The Toma de Razon in the Spanish archives was an official record of grants under the colonization laws of Mexico, yet it has never been admitted as primary evidence of the grants it notes. Is Book A of alcalde grants in San Francisco anything more than such a "Toma?" It is at best a mere memorandum of a grant. It is not and does not pretend to be a transcript of the grant. It omits all the conditions of the grant, and it only describes the

property granted by reference to the petition of the applicant, wherein the boundaries of the tract asked for are stated to be particularly recited.

We maintain confidently that the rules applicable to the admission of official books, and the admissibility of the facts therein recited as primary evidence, are in cases of facts *in pais*, and where there is no other evidence of these facts—not where they recite or suggest the existence of a written document. In the nature of things, a written document is the best evidence of its own existence and *contents*. It would be a remarkable stretch of the rules, where the official book of record thus recites or suggests the existence of a written document, to make such book primary evidence of not only the existence and contents of the written document, but also of its delivery.

We are not unmindful of the common law rule that the sovereign grants by record; which rule prevails in this country. But the Pueblo, even under Mexican dominion, was not the sovereign. It was simply a corporation having at best but limited rights and powers, and in case of an imperfect Pueblo like San Francisco, having no character of title which the government was at all obliged to respect. Whilst titles from the United States pass by record of the duly executed patent, yet the principle does not cover the official certificates of entry or location by the local land officers or other subordinate officers. It is only the act of the sovereign to which the rule applies, and not the transactions of minor officials with limited powers.

But if the widest latitude be given to the effect of a public record as matter of evidence, we deny that Book A is a public record within the meaning of the rule. Is it a public record at all? The "Spanish blotter" is the original Spanish record book relating to grants of town lots in San Francisco before the American conquest. If the rules above mentioned are broadened beyond what we claim to be their just scope, that book might fall

within the class of "public records," because it was made by undoubted officers of the former government as a register of their own official acts, and simultaneous therewith. But what legal or official standing did the American alcaldes have after July 7, 1846, which should give to their books the dignity of public records within the meaning of the rule? As this court held in Alexander *vs.* Roulet, (13 Wall., 387,) the authority of these officers clearly ceased with the change of flag. No one could have taken anything *per se* by a pretended grant from such American alcalde. Whatever title inured to them in connection therewith, sprung from subsequent confirmation by the legislative authority of the State and of Congress. The title came from such legislative confirmation, and not from the alleged original source of alcalde grant. In such view, these alcaldes were not public officers in relation at least to any matter of granting land titles, and their register of their acts *ultra vires* could not be dignified as public records. It was at best no more than an unofficial entry of an officer whose legal functions, if he had any, laid in a different direction. Whatever verity, then, attaches to the memorandum entries, very loosely made by them, comes entirely through the confirmatory legislation, and must follow in strict accordance with its requirements. That legislation requires clearly both a grant *and* a record, and the one can no more be dispensed with than the other. And with equal certainty the introduction of the original, or proof of its involuntary loss or destruction, must precede the record. With all possible respect, it seems to us that the difference between allowing the record as primary evidence because it is the grant, and allowing it as a public record, is unimportant, so far as the result is concerned. By a different use of language precisely the same end would be attained.

The substance of the foregoing three assignments of

error, so far as concerns the effect of Book A as evidence, may be briefly summarized thus:

The Mexican statute governing the granting of Pueblo lots—the Plan of Pitic—became obsolete, and was superceded by long established custom. The alcaldes, and particularly the Americans, adopted the plan of private conveyancing and registration. A grant was made by delivering to the grantee a conveyance. The fact thereof was noted, or the conveyance was copied in whole or in part in a register. To prove the grant, the best evidence is the paper itself, produced from the custody of the grantee; but in case of proven and involuntary loss or destruction, the record would ordinarily be good secondary evidence of it. But the legislation, from which the grants by American alcaldes derive their sole force and effect, requires production of both the grant *and* the record, and in the order of proof named.

FOURTH ERROR.

Because by reason of the uninterrupted and peaceable possession of the demanded premises, by the plaintiff and his grantor, from 1851, or 1852 to May 8, 1867, the Statutes of Limitation ran in favor of said plaintiff, and such possession gave plaintiff perfect title as against defendants.

By the 6th section of the act of the Legislature of said State, approved April 22, 1850, (2 Hitt. Digest, p. 1,) it was enacted that no action for the recovery of real property, or for the recovery of the possession thereof, should be maintained, unless it appeared that the plaintiff, his ancestor, predecessor or grantor was seized or possessed of the premises in question "within five years before the "commencement of said action."

By the act of the Legislature of said State, approved April 11, 1855, (2 Hitt. Digest, p. 2,) the said 6th section

of the act of April 22, 1850, was amended by adding a proviso to the effect that an action might be maintained by a party claiming "under title derived from the Spanish "or Mexican governments, or the authorities thereof," if such action were commenced within five years after "final "confirmation of such title by the Government of the "United States, or its legally constituted authorities"

By act of said Legislature, approved April 18, 1863, the said 6th section of the act of April 22, 1850, was re-enacted without the amendment made by the act of 1855, and last above referred to. By a proviso to the 6th section of the act of April 18, 1863, it was enacted—

"That any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican governments, or the authorities thereof, which shall not have been finally confirmed by the Government of the United States, or its legally constituted authorities, more than five years before the passage of this act, may have five years after the passage of this act in which to commence his action for the recovery of such real property, or the possession thereof, or any interest therein; or for rents or profits out of the same; or to make his defence to an action founded upon the title thereto."

The 7th section of the act of 1863, provided that final confirmation within the meaning of the 6th section should be a patent issued by the United States, or a final approval of survey under the provisions of the act of Congress, approved June 14, 1860.

Adverse possession for the period prescribed by a Statute of Limitation vests a perfect legal title, which can be asserted affirmatively by a party entitled to plead it. It not only bars a recovery by one out of possession, but gives a valid fee simple title which can be enforced affirmatively in all appropriate suits or actions against any adverse right or claim.

Angel on Limitations, sec. 1, 397, 398.

Shelly *vs.* Guy, 11 Wheat., 370.
Pendleton *vs.* Alexander, 8 Cranch, 469.
Leffingwell *vs.* Warren, 2 Black., 605.
Bradstreet *vs.* Huntington, 5 Pet., 402.

This proposition has been repeatedly affirmed by the Supreme Court of California in the construction of the statutes quoted.

Grattan *vs.* Wiggins, 23 Cal., 36.
Le Roy *vs.* Rodgers, 30 Id., 234.
Arrington *vs.* Liscom, 34 Id., 370–1.
Cannon *vs.* Stockman, 36 Id., 540.
San Francisco *vs.* Fulde, 37 Id., 352.

It is obvious that the plaintiff in error, by virtue of his own and his grantor's adverse possession for a period much longer than that prescribed by the statute, had, in 1867, when dispossessed, a perfect fee simple title to the premises in controversy, and upon that title must recover in this action, unless the defendant in error falls within some exception to the general rule prescribed by the statutes. Unless protected by some exceptional provision his remedy was barred, and our title became perfect as early as 1856 or 1857. It is claimed that he was thus protected by the amendatory act of April 11, 1855, and by the proviso above quoted to the 6th section of the act of April 18, 1863. We deny that he is within the provisions of either of these acts.

I.

The act of 1855 excepted from the general provision of the act of 1850: "Parties claiming * * * under "title derived from the Spanish or Mexican governments, "or the authorities thereof," for five years after "the time "of the final confirmation of such title by the Govern- "ment of the United States, or its legally constituted "authorities." This provision continued in force, and,

with the act of 1850, constituted the only statute of limitations applicable to real actions until the act of 1863. If therefore, the alleged grant to George Donner, conceding it for the present to have been a title "derived from the Spanish or Mexican governments, or the authorities thereof," was finally confirmed by the "Government of the United States, or its legally constituted authorities," more than five years prior to the act of 1863, then at that date plaintiff in error had a perfect title, and must recover.

We have already shown that the Donner grant had no validity whatever, except as subsequently confirmed by the Van Ness ordinance and succeeding legislation. For the purposes of the present enquiry, the case stands thus: The common council of the city confirmed title to those in possession, and in words provided that certain alcalde titles should be construed as being within the meaning of such confirmation. The act of the legislature of 1858 confirmed the ordinance of the common council. It was not, nor did it purport to be, a new grant. On its face it is a confirmation simply of the right theretofore conferred by the ordinance. The language is:

"That the within and before recited order and ordinances be, and the same are hereby, *ratified and confirmed.* * * * And it shall be the duty of all courts and officers to take judicial notice of the said order and ordinances, as hereinbefore recited, without further proof, as fully and effectually, to all intents and purposes, *as if they were public acts of the State legislature.*"

In a word, the said order and ordinances (Transcript, pp. 6, 7, 8, 9, 10,) are adopted by the legislature *nunc pro tunc.* By that act the said order and ordinances became legislative enactments from the dates, respectively, of their original adoption.

The act of Congress approved July 1, 1864, (Transcript,

p. 10,) relinquished and granted to the city all the right and title of the United States to the lands within its corporate limits, "*for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of said State,*" &c. This act was also, by relation, a release and confirmation of the grants made by said ordinances. If the alcalde titles, made after change of flag, were titles derived from Spain or Mexico at all, then, by the act of 1864, they were finally confirmed *nunc pro tunc*—as of date of the city ordinances—and the statute had run in our favor and vested a title in the plaintiff in error long prior to the statute of 1863.

II.

The act of 1863 was in substance a legislative declaration of the then established construction of the acts of 1850 and 1855, with the addition thereto of a requirement (to be hereafter noted) that all *defences* based on titles derived from the Spanish or Mexican governments should be made within five years after its passage.

The amendment of 1855 excepted titles derived from the former government from the operation of the statute, until after they were *finally confirmed* by the United States. Final confirmation was construed by the Supreme Court of the State to mean the issuance of a patent, or a final confirmation of a survey under the act of June 1, 1860.

Reed *vs.* Spicer, 27 Cal., 65.
Johnson *vs.* Van Dyke, 20 Id., 225.
Beach *vs.* Gabriel, 29 Id., 585.
Mahoney *vs.* Van Winkle, 33 Id., 456.

The act of 1863 continued the original provision of the act of 1850—the general five years limitation—and repealed the amendment of 1855, substituting in its stead the provisions of the 6th section above quoted, and providing also that the final confirmation mentioned in said

6th section should be construed to be a patent or final survey under the act of 1860.

The statute continued, therefore, to run in our favor after the passage of the act of 1863, as it did before—subsequently to the Van Ness ordinance; and it continued so to run until we were illegally dispossessed by execution issued in the case of Donner *vs.* Palmer, in May, 1867.

III.

But the act of 1863 also placed a still further restriction upon the assertion of these slumbering Spanish and Mexican claims. It provided not only that an adverse possession for five years after final confirmation should bar a recovery upon them, but it went still further and adopted one of the most stringent provisions ever found, so far as we have been able to discover, even in a statute intended to forever settle and quiet titles. It enacted that *no defence should be allowed upon them*, unless the same were made within five years thereafter. The language of the statute is plain; admits, we submit, of but one construction, and is not to be construed or explained away merely because it happens to be anomalous and novel in its character and effect. With the wisdom or propriety of the law courts have nothing to do.

The sixth section, after providing that where the statute had already commenced to run the time already elapsed should be computed in the five years, then enacts in substance that a person claiming under Mexican or Spanish title, not finally confirmed more than five years prior thereto, should have five years thereafter "in which to "commence his action for the recovery of such real prop- "erty, or the possession thereof or any interest therein or "for rents or profits out of the same, *or to make his defence* "*to an action founded on the title thereto.*"

We are unable to see how this provision can be construed in any other way than the one we have suggested.

There is nothing ambiguous or uncertain about it. There seems to be literally no room for construction. The claimant is given five years after the passage of the act to commence his suit. That is clear. But he has also five years thereafter to do something else. What? To make his defence to an action founded on the title thereto. Does any one doubt what the words "to make his defence to an action," mean? Certainly not. Their meaning is as certain and exclusive as is that of the words "plaintiffs," "defendants," "declaration," "judgment" or "writ of error." But the kind of action is specified: "founded on the title thereto." Title to what? Obviously and beyond question title to the premises in controversy and claimed adversely by the plaintiff. That is the plain, grammatical and ordinary signification of the words.

And there is no other construction that is grammatical, plain and ordinary. The substantive "thereto" must refer to some noun or pronoun preceding it. The only ones to be found are "real property," "possession" thereof, "interest" therein and "rents and profits." It must refer to one or all of these, and the "title" must be the title to one or all of them. The ordinary grammatical disposition is to say it refers to each of them. They would each in different grammatical formation be the objects of the preposition "to," that is to say "founded upon the title to the real property," "to the possession," "to the rents and profits." The title might be of many different kinds. That does not affect the sense. *Any title* thereto, that is to the "real property," "possession," &c., is covered by the language.

Now we submit that where words of a statute are so plain and unambiguous there is no room for construction and the express declaration of the law must be observed and enforced, irrespective of any considerations of utility or propriety of the rule as thus established.

Statutes of Limitation are to be construed strictly, and enforced as statutes of repose.

Demarest *vs.* Wyncoop, 3 Johns., 139, 146.

They are not to be explained away, but enforced as other statutes.

Clemenson *vs.* Williams, 8 Cranch, 72.
Bell *vs.* Morrison, 1 Peters, 351.
McClung *vs.* Silliman, Id., 270.
U. S. *vs.* Wilder, 13 Wall., 254.

No hardship results from this construction, as seems to have been assumed; and there appears to be as little tenable ground for the claim that the legal effect of the language was not fully within the intent of the legislature.

The statute was intended as one of repose. The object was to settle the apparently interminable legal controversies in the State, affecting lands. The most prolific source of this litigation was unconfirmed and unsettled Mexican claims. As long as they remained unadjudicated they retarded the growth and development of the State. To ascertain and settle the various questions affecting them, this statute provided that all defences upon them must be made within five years. It was practically saying to these claimants: You know the source, origin and nature of your title. It is and has been in your power, since the act of Congress of 1851, to procure their confirmation by the United States. The law already says that if finally confirmed, you shall be barred after five years adverse occupation. That provision we retain; but we propose to go further and provide something more. Your condition as claimants to unconfirmed grants puts it in your power to tie up large bodies of land, practically to withhold them from general use, retarding the development of the State. What we desire is repose; and while we still retain the five years limitation after confir-

mation, we adopt another provision, intended to reach such of you as purposely or negligently delay the presentation of your claims, so as to prevent the running of our otherwise general statute. We will limit your right to make a defence upon these titles to the same time fixed to bar your recovery after confirmation. Our courts are open to you before confirmation. You may sue in ejectment; and if your title is good, we will sustain it. You can also file your bill to quiet title, if any adverse rights are outstanding and not barred. It is impossible for you not to know of them, if any exist, for they are matter of record, or are founded upon prior adverse possession, of which you must have knowledge. But failing in this, and if you still allow the period to run against you, after, by this public statute, you are admonished of the necessity of defending your rights, and the danger of losing them if you slumber, you shall not be allowed to defend by those titles at all.

That was the intent of the legislature, and it would have been difficult to have found words more apt to express that purpose. By what process of legal reasoning can that intent, so plainly and unambiguously expressed, be explained away? Here is a statute, passed by a legislature confessedly having constitutional power to prescribe a limitation to actions, expressly and in positive language placing a prohibition upon a certain character of defence after a prescribed period. It is found in a statute which, in the language of Chief Justice Marshall, in Mentson *vs.* Williams, "is entitled to the same respect with other "statutes, and ought not to be explained away;"—in a statute belonging to a class of which this Court, in United States *vs.* Wilder, (13 Wall., 254,) says:

"This Court has not adopted the rule of decision made at one time in England and to some extent in this country, under which, by a constructive equity, judicial refinements came near to abolish the statute altogether.

On the contrary, following the decisions of the English courts, made more immediately after the passage of the statute of James I., we have sought to give it full effect."

How can that provision, with due regard to the force of precedents and established rules of law, be avoided or rendered inoperative?

There is one consideration in connection with this branch of the case that deserves special notice; for, in our judgment, it constitutes the only tenable objection to the statute of 1863, either in reason or on constitutional grounds. It is urged that the legislature of California exceeded its power in attempting to put the statute in operation against claims derived from the Mexican government before their final confirmation by the United States; that by the treaty and the legislation of Congress, in pursuance of treaty stipulations, the good faith of the United States was pledged to the confirmation of valid claims; and that the State statute of 1863, by attempting to limit their enforcement before final action by the United States, is open to the objection of unconstitutionality, and is, therefore, to that extent void.

In the case of Montgomery *vs.* Beven (1 Sawyer, 663,) the effect and character of the 6th section of the act of 1863, as applied to unconfirmed grants, was specifically raised and decided. It was there held that this statute, so far as unconfirmed grants were concerned, was inoperative and void; and that the limitation commenced to run at date of final confirmation, and not before. The controversy in that case was between two alcalde titles in San Francisco; and it was held that these titles were finally confirmed, so as to put the statute in operation, by the act of Congress approved July 1, 1864, confirming the Van Ness ordinance.

We are not disposed to question the correctness of the doctrine that even the statute of 1863 was inoperative to

start the period of limitation until *final confirmation.* We think it the law. But that concession does not in the slightest degree aid the defendant in error in the case at bar. It is not denied that the Donner title was finally confirmed, if confirmed at all, by the act of July 1, 1864. From that moment, most assuredly, the statute, even upon the theory of the defendant in error, commenced to run and ran not only to bar his recovery, after five years from that date, but also to prevent his making any defence after that time. Both are specific requirements of the statute, and he was as much required to observe and avoid one as the other.

It is no answer to this proposition to say that within five years thereafter he obtained possession of the premises. That saved him from only one of the provisions that were running against him. He must still have made his defence to any action founded upon title to the premises within five years. And if any such title existed (and it was impossible for one to have existed without his knowledge, to which he would not, independently of his Mexican title, have had a good defence), it was his duty to quiet title by affirmatively moving in a court of equity, as he could have done under the civil practice act of the State (sec. 254), if not under the general jurisdiction of equity, independently of any statute.

Equally untenable is the argument that he is relieved because plaintiff in error did not give him a chance to defend in five years. We were not obliged to do that. The law prescribed his rights and penalties for neglect, and it also prescribed ours. It gave us five years after our unlawful ouster to commence suit and it required him to defend upon his Mexican title, if at all, within five years after final confirmation. We have used the advantages the law gave us and he has neglected those which the law gave him.

We were ousted on the 8th day of May, 1867. We commenced this suit April 30, 1872, within five years.

At the very best and upon his own theory, his Mexican title was confirmed July 1, 1864. His answer, in this suit, was filed June 5, 1872, nearly eight years thereafter.

IV.

But even if defendant in error is entitled to the protection of the proviso to the sixth section of the act of 1863, and is not within the prohibition above discussed, he is still in a position where he cannot, under the pleadings, raise that question at all.

A plaintiff in ejectment is not required to set out his title. It is good pleading and sufficient if he alleges a title in himself, ouster by defendant and wrongful detention of the premises. His derangement of title is matter of evidence.

Coryell *vs.* Cain, 16 Cal., 572.
Payne *vs.* Treadwell, Id., 246.

This has been the uniform rule in California from that day to the present and the late cases hold that it is not necessary even to allege ouster.

Owen *vs.* Fowler, 24 Cal., 194.
Owen *vs.* Maston, Id., 373.

Plaintiff properly alleged in his complaint (Transcript, pp. 3, 4.) title and right of possession in himself, adverse, unlawful, and wrongful possession in defendant and wrongful detention of the premises.

Defendant's answer (Transcript, p. 4) is (1) general denial; (2) plea of the statute of limitations as against plaintiff.

It is obvious (1) that plaintiff has title under the statute, unless defendant is protected by the exception; (2.) that the statute has not run against us as we commenced this suit within five years.

Now to avail himself of the *exception* of the statute, de-

fendant must have specially set out in his answer the facts necessary to bring him within its terms. He must have alleged that he claimed under title derived from the Mexican or Spanish government or proper authorities thereof, and that his claim had not been finally confirmed by the United States more than five years before the commencement of the suit.

Richardson *vs.* Williamson, 24 Cal., 296.

Maris *vs.* De Celis, 51 Id., 60.

Arrington *vs.* Liscom, 84 Id., 389-90.

Wheeler *vs.* Webster, 1 E. D. Smith, 1.

This he has not done. It is true that the fourth finding of fact (p. 5) recites that the claim of the city to its municipal lands had not been finally confirmed at the date of the act of the State legislature of April 18, 1863, or of the act of Congress confirming the Van Ness ordinance, approved July 1, 1864. But the evidence upon which this finding is based, is not before this Honorable Court, and any presumption of the existence of such evidence arising from the finding, would not affect the application of the rule we invoke; for such evidence, if introduced, was, as we understand the law, inadmissible under the pleadings, and its admission being error apparent upon the face of the record, is a proper subject of review here upon writ of error.

V.

There is, however, a further objection to defendants' claim to protection against the statute of limitation, which, in our judgment, is conclusive of the case at bar.

The exception by the amendatory act of 1855, and by the proviso to the 6th section of the act of 1863 was of titles derived from the former Government. The language of the act of 1855 was, "An action may be maintained by a party claiming such real estate or the possession thereof *under title derived from the Spanish or Mexican*

governments or the authorities thereof." The words of the act of 1863 are, "Any person claiming real property or the possession thereof, or any right or interest therein, *under title derived from the Spanish or Mexican governments or the authorities thereof.*"

We assert with considerable confidence in the soundness of our proposition, that the so-called alcalde grant to George Donner *was not a title derived from the Spanish or Mexican governments.*

It is a well established rule of international law, that even temporary military occupation of an enemy's territory, in whole or in part, operates to the extent of such occupation, to suspend the authority and jurisdiction of the conquered State and establish in its place the authority and jurisdiction of the conqueror.

Halleck's International Law, pp. 776–7, 780.
Heffter, Droit International, §§ 131, 186.
Gardner, Institutes, p. 208.
Vattel, Droit des Gens, liv. 3, ch. 13, § 197.
Opinions Att'y Gen., vol. viii, p. 369.
Flemming *vs.* Page, 9 How., 603.
Cross *vs.* Harrison, 16 Id., 191.

The title to such territory becomes complete in the conqueror by treaty of peace, by entire subjugation of the territory and destruction of its power, or by such a weakening of the adversary's strength as to destroy all reasonable hope of recapture.

Halleck's International Law, p. 811.
Vattel, Droit des Gens, liv. 3, ch. 13, § 201.
Wheaton El. Int. Law, pt. 2, ch. 4, § 5.

The municipal laws of the conquered territory remain in force until modified, changed, or set aside by the conquering power.

Halleck's Int. Law, pp. 781–2.

Ortolan, Diplomatie de la Mer, liv. 2, ch. 13.
Campbell *vs.* Hall, 1 Cowper, 204.

But they remain in force, not *proprio vigore*, but because it is presumed the new sovereign has adopted and continued them.

Halleck's Int. Law, p. 831.
Cross *vs.* Harrison, 16 How., 189, 190.

The President of the United States, as Commander-in-Chief of the Army and Navy, may, when war has been declared, seize and occupy the territory of an enemy and establish a government and laws for such territory. And, although such territory cannot be made a part of the Union without action by another department of the Government, yet such seizure and occupation operates to suspend the supremacy of the former government, and establish that of the United States. As regards all other nations, it is a part of the United States, as much so as if included in our established boundaries.

Halleck's Int. Law, p. 785.
Gardner's Institutes, p. 208.
Fleming *vs.* Page, 9 How., 615.
Cross *vs.* Harrison, 16 Id., 164.

The Federal Constitution is extended over conquered territory which by session or confirmation becomes part of the United States. The conquest is governed, *as such*, until Congress legislates for it or gives it a right to legislate for itself. Until then the local government represents the sovereignty of the United States, to which the territory has passed.

Halleck's Int. Law., pp. 829, 830.
Cross *vs.* Harrison, 16 How., 165.
Dred Scott *vs.* Sandford, 19 Id., 293.

The conqueror acquires the same rights in the conquered

territory as were possessed by the former sovereign. It is united with the new government upon same terms as to municipal rights possessed under the former government.

Halleck's Int. Law, 813.

American Ins. Co. *vs.* Canter, 1 Peters, 542.

It would seem to be settled by these authorities beyond question and upon general principles that when the military forces of the United States upon the 7th day of July, 1846, took formal possession of Monterey, and with it practical possession of all that Mexican territory now known as the State of California, the sovereignty of Mexico was displaced, and that of the United States succeeded to it; that thereafter and until formal cession by treaty the local government subsisting in said territory was the representative of the United States; that until changed by the United States the former municipal law prevailed, not *proprio vigore*, but because by presumption it had been adopted and continued by the conqueror; and the United States, through its representative local government, was the sovereign power from which every valid act of municipal administration proceeded and derived its validity.

But this question, so far as it concerns the rights of Mexican officials to dispose of the former public domain of that country after the 7th day of July, 1846, is by no means a new one in this court.

"Congress recognized the existence of war between Mexico and the United States on the 13th of May, 1846, and it is not denied that the official functions of the Mexican officers in that department *entirely ceased* as early as the 7th of July of that year."

United States *vs.* Castillero, 2 Black, 149.

"This court has more than once decided that the official functions of the Mexican officers in California ceased as early as the 7th of July of that year (1847.)"

Romero *vs.* United States, 1 Wall., 743.

To the same effect precisely are the following cases in this court:

United States *vs.* Gomez, 23 How., 325.
Same *vs.* Yorba, 1 Wall., 423.
Mumford *vs.* Wardell, 6 Id., 435.
Merryman *vs.* Bourne, 9 Id., 601.
Alexander *vs.* Roulet, 13 Id., 387.

We then observe that from the earliest adjudicated cases down to the present day an uninterrupted line of decisions in this court are to the effect that the conquest of California was completed, as a conquest, on the 7th day of July, 1846, and that from and after that date the Mexican government was absolutely displaced by that of the United States and the powers of all former Mexican officials ceased and determined.

These were all cases involving questions as to the power of these officers to dispose of public lands subsequently to that date. The latest of these cases, so far as we have been able to discover, is that of Alexander *vs.* Roulet. That case involved a question as to the right of a prefect of the district then embracing the pueblo of San Francisco to make a grant of unappropriated public land in said pueblo after the 7th day of July, 1846. It is exactly the case at bar, except that in the former the alleged grant was by a prefect, while here it is by an alcalde. They were both municipal officers recognized by the former government. They both claimed the right, and both probably possessed the right under Mexican law to make valid grants.

In that case the court say:

"It is not necessary for the purposes of this suit to decide whether prefects of California, while the same was a part of the Mexican territory, were authorized to make grants of the common or unappropriated lands of the pueblos within their jutisdiction, because in this case the grant was after the conquest and acquisition of the country

by the United States, and if the prefect had such authority before that event it clearly ceased with the changed relations of the people. By the conquest Mexican rule was displaced, and with it the authority of Mexican officials to alienate the public domain, and as a necessary consequence of this conquest the Constitution of the United States, which gives to Congress the disposition of the public lands, was extended over the territory of California. Until Congress provided a government for the country it was in charge of military governors, who, with the aid of subordinate officers, exercised municipal authority; but the power to grant lands or confirm titles was never vested in these military governors, nor in any person appointed by them."

In this unbroken line of decisions we have been able to find but one single case that in any way dissents from the proposition we advanced at an early stage of our argument, viz.: that all grants by alcaldes after the change of flag were absolutely void, and are entirely dependent upon subsequent legislation for any validity which they possess. The decisions cover specifically and particularly cases of attempted disposition of public lands by Mexican officials after change of flag. The case of Alexander *vs.* Roulet is one of such attempted disposition by the *prefect* of a district including the then *pueblo of San Francisco.* The one exception to which we refer is that of the case of Merryman *vs.* Bourne, 9 Wall. In that case the court held specifically that the conquest was completed on the 7th day of July, 1846, but held also that an alcalde grant made after that date was valid. It seems difficult to reconcile that case with those that precede and follow it if it is considered as deciding that such an alcalde grant was, *per se,* valid independently of subsequent legislation. We construe it as deciding simply that such grants are good, and we look for the reason in part to the subsequent legislation of Congress.

We suggest, however, that if in conflict with Alexander *vs.* Roulet the latter overrules the former.

So far as it effects the present branch of our investigation it makes no difference with our case whether or not the court in Merryman *vs.* Bourne affirmed the validity of alcalde grants made subsequently to change of flag and independently of the subsequent legislation. In either event the grant would be the act of an American officer, an official of that local temporary government, itself the representative of the United States. The grantee would claim under that local government and the sovereignty of the United States, and not "under titles derived from the Mexican or Spanish governments or the authorities thereof." In this particular the case of Merryman *vs.* Bourne is as emphatically an endorsement of our proposition as any of the others cited.

In the light of these authorities we are unable to understand how it can be seriously claimed that the grant by Alcalde Ilyde, himself an American, made on the 19th day of July, 1847, to George Donner, was a "title derived from the Spanish or Mexican governments or the authorities thereof."

We are so thoroughly impressed with the soundness of our position upon this point that we are somewhat at a loss for a suggestion to support the opposite theory. We are not unmindful of the decision of the Supreme Court of the State in Donner *vs.* Palmer, and perhaps other cases, and that of the United States Circuit Court in Montgomery *vs.* Beven, (1 Sawyer.) But in neither do we find anything further than the unexplained approval of the doctrine that these alcalde titles were derived from Mexican or Spanish authority. The reasons or arguments that moved to this conclusion are not referred to or announced. The court below in this case is equally silent.

We suppose the argument must rest upon the theory that the pueblo had in some form or in some way a *grant* prior to the conquest; that the American establishment was successor in interest thereto, and that the alcaldes

who held office under the local temporary government preceding the creation of the State, as officers of such establishment had power to grant lands, not as original grants, but merely as conveyances of the pueblo title. In other words, that the alcalde was, as representative of the pueblo, a mesne conveyor. But this theory is radically defective and untenable.

1. The pueblo never had a grant at all in any proper sense of the word, or any interest that it or its officers could convey, except in execution of certain limited and restricted trusts. This has been repeatedly decided by this court. Townsend *vs.* Greeley, (5 Wall., 336.)

Can it with any reason be said that this right was a *title to land* subsisting in the pueblo capable of transmission as the interest or estate of an individual would be? Suppose the case of an alcalde grant prior to conquest. Did the grantee by such grant under the Plan of Pitic or under the custom of the country which supplanted it, acquire an *ancient title* through a *mesne conveyance?* Certainly not. His grant was the origin—the inception of his right—which itself was a mere temporary privilege to use certain lots for certain purposes. The source of his grant, the pueblo, was the weakest of all known rights. Title it had absolutely none. It was itself always subject to the control and action of the General Government. The pueblo from the fact of its existence was entitled to certain restricted privileges under the Plan of Pitic or custom. Its grantee under the same plan or custom had certain privileges originating in his grant. He had no title which his grant carried back. Custom gave the pueblo certain rights upon and because of its mere existence as a pueblo; custom gave a grantee certain rights upon and because of his so-called grant.

Did the conquest add any dignity to these rights? Was the pueblo under the local or military government raised to higher dignity than it possessed under the Mexican